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In the

Supreme Court of the United States

No. 592

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

BRIEF AND APPENDIX IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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"The powers and duties of the Superintendent of Public Instruction shall be prescribed by law."

The General Assembly has assigned to him the duties of formulation of such rules and regulations and provision of such assistance in his office as shall be necessary for the proper and uniform enforcement of the school laws in cooperation with the local school authorities (§22-25 of the Code). It provided further that he should have additional duties as prescribed by the State Board of Education (§22-26) and made him Secretary of the State Board of Education (§22-28). Examination of the pertinent statutes and regulations of the State Board reveals that, as a practical matter, the Superintendent of Public Instruction on the State level performs many of the functions of the Division Superintendent on the local level.

In the case of the Superintendent of Public Instruction the Court is unable to find, nor has its attention been directed to, any power in or duty imposed upon the Superintendent to establish, operate or maintain the public free schools in any county, city or town.

The Court is of the opinion that, with respect to the establishment, operation and maintenance of public free schools in Prince Edward County under the facts and circumstances as shown by the evidence in this case, that the County School Board of Prince Edward County and the Division Superintendent of Schools of Prince Edward County have exercised every power and performed every duty incumbent upon them under the Constitution and statutes of Virginia. The Court is of the opinion, further, that, with respect to said schools under the said facts and circumstances, the State Board of Education and the Superintendent of Public Instruction have exercised every power and performed every

duty incumbent upon them under the said Constitution and statutes.

In Paragraph Number 12 of the Amended Complaint, upon which this proceeding is based, it is alleged that the assertion has been and is being made by certain defendants herein that State Scholarship grants are not available to the parents of children resident in Prince Edward County so long as the public schools in the County remain closed. This Court has found that the assertion has been and is in fact being made as evidenced by Plaintiffs' Exhibit # 22. The question necessarily involves consideration of Section 141 of the Constitution of Virginia and the statutes enacted subsequent to the 1956 amendment thereof. Particularly pertinent are the provisions of Chapters 448 and 461, Acts of Assembly, 1960, now codified as §§22-115.29 through 22-115.35 and §§22-115.36 and 22-115.37, respectively, of the Code of Virginia.

The 1956 amendment of Section 141 was adopted after the Comptroller of the Commonwealth had questioned the validity of Item 210 of the Appropriation Act of 1954, which provided for the payment of tuition, institutional fees, room and board, etc., for the secondary or collegiate education of children of Virginia citizens killed in action or totally disabled as a result of military service during World War I and or any armed conflict subsequent to December 6, 1941. The maximum amount of $400.00 per school year per child was to be paid when approved by the Superintendent of Public Instruction. The Comptroller felt that the language used would have made the funds available while such children were attending either sectarian or non-sectarian private schools.

The Supreme Court of Appeals, in which court, the Attorney General had sought a writ of mandamus, considered

whether Section 141 of the Constitution prohibited such payments where the eligible children attended private schools. That Court held that the fact that in the administration of the Act the funds may be paid to the parents or guardians of the children and not directly to the institutions did not alter the underlying purpose and effect of the appropriations—i.e. an appropriation for the benefit of private schools. The Court suggested that if payments for tuition and other expenses of children who attend private schools be a desirable end, it should be accomplished by amending the Constitution of Virginia, since it should not be done by judicial legislation. *Almond* v. *Day*, 197 Va. 419, 426, 431.

Following this decision in November, 1955, Section 141 was amended and now reads:

> "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students *in public and non-sectarian private schools and institutions of learning*, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citi-

> zens of the several States joining in such agreement; third, that counties, cities, towns and districts may make appropriations to non-sectarian schools of manual, industrial or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district."

A careful reading of the Journal of the Constitutional Convention of Virginia (1956) reveals that the Convention was well aware of the fact that local governing bodies throughout the State held the financial keys to the schoolhouses in their respective localities and it was clear, even in 1956, that some of these boards of supervisors and city and town councils might well refuse to levy or appropriate the sums necessary for the participating shares of the localities which were prerequisite to the receipt of State appropriations. The General Assembly so construed the intention of the draftsmen of the Amendment, for in §22-115.32 of the Code, the Section which fixes the amount of local scholarship grant to be added to the amount of the State scholarship, the third alternative is declared to be the total cost of operation, excluding debt service and capital outlay, per pupil in average daily attendance in the public schools of the county, city, or town providing such scholarships, as determined by the Superintendent of Public Instruction for the school year in which public schools were last operated in the locality.

The present scholarship grant statute is the third which has been enacted, both the 1956, Extra Session, and the 1959, Extra Session, statutes, which preceded it, having been repealed in turn. Section 22-115.29 of the Code declares that it is the policy of the Commonwealth to encourage the education of all of the children of Virginia; that to

afford each individual freedom of choice it is desirable and in the public interest to provide public funds for the education of children in non-sectarian private schools, in or outside, and in public schools outside, the locality where the children reside; and that local governing bodies should be authorized to levy taxes and appropriate funds for scholarships.

Section 22-115.30 describes the children eligible and entitled to the State scholarships and fixes the amounts. Section 22-115.31 authorizes local governing bodies to appropriate funds for local scholarships in such amounts as they may deem proper, not less than the minimum set by the statute, while § 22-115.32 describes the children eligible and entitled to receive local scholarships and fixes the minimum amount thereof. Section 22-115.33 directs the State Board of Education to promulgate rules and regulations for the payment of scholarships and administration of the statute. The State Board may prescribe minimum academic standards which must be met by non-sectarian private schools to permit a child attending any such school to receive a scholarship, but the Board is prohibited from regulating as to private school requirements with regard to eligibility of pupils for admission.

Should a local governing body fail to provide local scholarships as authorized by the preceding sections, it is provided in Section 22-115.34 that the State Board of Education shall direct the Superintendent of Public Education to provide for the payment of scholarships on behalf of the county, city, or town concerned. Sums so paid out will be deducted by the Comptroller from other State funds appropriated for distribution to the locality in order to reimburse the State, but no such deductions may be made from funds to which the county, city, or town may be entitled under Title 63 of the Code or for the operation of public schools.

The last section of Chapter 448 of the 1960 Act makes it a misdemeanor for anyone to seek to or to obtain or expend any scholarship funds for any purpose other than that for which they are intended (§22-115.35 of the Code). Sections 22-115.36 and 22-115.37 of the Code authorize and empower the governing bodies of counties, cities and towns to appropriate and expend local funds for educational purposes in furtherance of the elementary and secondary education of children residing in such counties, cities and towns in such amounts as may be provided by ordinance and require express reference to the Article in which the Sections appear before other statutes may be construed in limitation of the powers conferred by §22-115.36.

This Court is unable to find in either the Constitution of Virginia, with particular reference to Sections 129 and 141, or in the above-cited statutes (§§22-115.29 through 22-115.37), or in the Regulations of the State Board of Education, any prohibition, restriction or condition which would prevent the payment of State and local scholarship grants to or for the benefit of any eligible child in the Commonwealth whose parents, or those standing *in loco parentis*, desire that such child attend either a non-sectarian private school within or without the locality of which he is a resident or a public school without that locality. It is clear that the intent and plain language of Section 141 and the intent and plain language of the Scholarship Grant law is to provide the means for the education of each eligible child. If the public schools are in operation in the child's county, city, or town, he has a choice between those public schools, non-sectarian private schools throughout the State and public schools outside the county, city or town. If the public schools are not in operation in his county, city, or town, his choice is limited to non-sectarian private schools anywhere in the State or public

schools outside the locality. By the same token, if there are no non-sectarian private schools in the county, city, or town, the choice is further limited, but the funds for his education are nevertheless available from the State.

No State funds are withheld or diverted by this legislation from any public free schools. The Supreme Court of Appeals has held in *Harrison* v. *Day,* 200 Va. 439, 452, that Section 141 of the Constitution, as amended, authorizing State and local appropriations for the purpose of tuition or scholarship grants places no restriction on the manner in which this is to be done, thus leaving it to the discretion of the General Assembly. The General Assembly, in the exercise of its discretion, has given due regard to the fact that public schools in a locality might be closed and has made provision for the continued education of the children of the Commonwealth in the event such a contingency occurs. In so doing the principle of local option as to the operation of public schools within a county was again recognized.

The Court turns now to the final issue raised by the Complaint as amended and the responses thereto. In paragraph Number 14 of the Complaint as amended a question is raised as to whether the public schools operated and maintained previously in Prince Edward County may remain closed while public schools are operated and maintained in other localities in Virginia without violating some right or rights secured by the Constitution of the United States to the defendants, Leslie Francis Griffin, Sr., and Leslie Francis Griffin, Jr., James L. Carter and Betty Jean Carter, Warren A. Reid and Jacquelyn Reid. Section 1 of Amendment XIV to that Constitution reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 of this Amendment reads:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Court is aware of no federal statute requiring a State to provide public free schooling for its citizens, nor is the Court aware of any provision of the Fourteenth Amendment which requires a State either to operate public free schools or to provide State Scholarship grants or any other form of free public education. On the contrary, whether free public education shall be provided is strictly a matter for State determination. *James* v. *Almond*, 170 F. Supp. 331, 337.

This Court has determined above that in this case the actions, on the one hand, and the inability to act, on the other, of the plaintiffs, County School Board of Prince Edward County and the Division Superintendent of Schools of Prince Edward County, and of the defendants, State Board of Education and Superintendent of Public Instruction, do not violate either the Constitution or the statutes of Virginia and that the system of public free schooling established by the General Assembly is predicated upon the theory of home rule or local option. In other words, territorial uniformity is not a constitutional requisite. This is by no means a new feature in Virginia government, nor is it unique when that principle is applied to public education.

Local option as to the sale of beer and other alcoholic beverages within a locality is provided for by the Virginia Alcoholic Beverage Control Act, in particular by §4-45 *et seq.* of the Code. That same Act permits the governing body of each locality to adopt "Sunday" ordinances prohibiting or fixing the hours within which beer and wine may be sold on Sundays (§4-97). Whether juvenile detention facilities will be established in a particular locality is left to the option of the local governing body by §§16.1-201 and 16.1-202 of the Code, participating State funds being provided where the election is made in favor of the establishment of such facilities. In the field of hospitalization and treatment of indigent persons Chapter 15 of Title 32 of the Code provides for State contributions where a county or city elects to participate in the program established by the General Assembly.

The Supreme Court of Appeals of Virginia has recognized consistently the local option or home rule aspect of the system established pursuant to Article IX of the Constitution of Virginia. This Court will not belabor the point further other than to cite the *Griffin* case found reported in 203 Va. 321 and *Harrison* v. *Day,* 200 Va. 439. A study of many federal cases is supportive of the view that the federal courts are of the opinion that a State has the power to pass a local option law without violating constitutional rights. See *Ohio ex rel Lloyd* v. *Dollison,* 194 U. S. 445.

It appears that in each instance the question of ultimate control should be dispositive of the issues presented by local option systems whether they be concerned with education, hospitalization, recreation or any other public facility. If the ultimate control—the final determination of whether a service or privilege is to be furnished to all citizens alike—lies with the State, then to refuse such service or privilege

to any of its citizens, without proper classification, may create an inequality of benefits. But where the people of a locality have the power of self-determination, the situation is different.

The Jacksonville, Florida, cases involving municipal swimming pools and a municipal golf course show that the federal courts recognize and give effect to the local option system. *Hampton* v. *City of Jacksonville*, 304 F. (2d) 319, and *Hampton* v. *City of Jacksonville*, 304 F. (2d) 320. Similarly, where Harris County, Texas, owned and operated a public beach and Greensboro, North Carolina, owned and operated a public swimming pool, the closing of the beach and of the pool to all residents of the localities involved were held not to constitute any unconstitutional discrimination. *Willie* v. *Harris County*, 202 F. Supp. 549 and *Tonkins* v. *City of Greensboro*, 162 F. Supp. 549, aff. 276 F. (2d) 890.

Reference could be made to numerous other decisions of the federal courts confirming this view, but such reference would only prolong this already lengthy opinion. The public free school system of Virginia and her coordinate provision for State and local Scholarship grants are not deemed by this Court to constitute a scheme for the evasion of the decision of the United States Supreme Court in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483. Her adoption of the local option concept long antedates that decision. Further, in many localities other than Prince Edward County that decision is being carried out by the local school authorities and by the local governing bodies. That these other localities have so chosen to act does not make the inaction of the local governing body of Prince Edward County invalid, nor is the converse true.

In sum, the Court is of the opinion that none of the actions

of the plaintiffs, County School Board of Prince Edward County and Division Superintendent of Schools, and of the defendants, State Board of Education and Superintendent of Public Instruction, under the facts and circumstances of this case, in connection with the "non-operation" of public schools in Prince Edward County, have the effect of violating any rights of the defendants Leslie Francis Griffin, Sr., and Leslie Francis Griffin, Jr., James L. Carter and Betty Jean Carter, and Warren A. Reid and Jacquelyn Reid, under the Constitution and laws of Virginia or under the Constitution of the United States, although public free schools are in operation in other localities in the Commonwealth and, therefore, the failure to operate and maintain such schools in Prince Edward County is not violative of any right secured to the six individual defendants next above named.

In view of the length of this letter opinion, necessitated by the many varied issues presented in this case, the Court will not recapitulate its findings here, but rather will fix the date and hour of Wednesday, April 10, 1963, at two o'clock p. m. in chambers at the City Hall, Richmond, for the receipt and consideration of a sketch or sketches for a decree embodying the findings of the Court. At that time the question of a reasonable fee for the guardian ad litem for the infant defendants will be determined. It may be that in the course of this letter the Court has omitted inadvertently reference to some aspect of the case which one or more of the parties is entitled to have considered. Counsel will please be prepared to bring any such matter to the attention of the Court.

In the event the April 10th, two o'clock p. m., date and hour conflict with the schedule of counsel for any of the parties, it is requested that the Court and other counsel be so informed and the Court will meet with counsel on Satur-

day, April 13, 1963, at ten o'clock a. m., in chambers at the City Hall. The Court wishes to express its appreciation for the many excellent briefs and arguments of counsel for the parties, the guardian ad litem, and of *amicus curiae*.

Very truly yours,

(s) John Wingo Knowles
John Wingo Knowles
Judge

JWK:ft